

CHAPTER 16

PRIVACY COMPLAINT PROCESS

I. GENERAL RULE

HIPAA mandates that DMH have a process for individuals to file complaints about DMH's privacy policies and procedures and its compliance with those policies and procedures. Also, DMH must document all complaints received and their disposition.

For the purposes of this Chapter, the complaints described in the preceding paragraph will be called "Privacy Complaints," to distinguish them from complaints filed with DMH pursuant to its "Investigating and Reporting Responsibilities" regulations, 104 CMR 32.00, et seq. A Complaint filed pursuant to those regulations will be called a "104 CMR 32.00 Complaint."

With some modifications, DMH has decided to use its current 104 CMR 32.00 complaint process to process Privacy Complaints. This is because in certain circumstances, as described below, an allegation may be both a Privacy Complaint and a 104 CMR 32.00 Complaint. Additionally, the HIPAA requirements regarding Privacy Complaint reviews are very similar to the 104 CMR 32.00 Complaint fact-finding/investigation requirements.

The process for responding to Privacy Complaints that is described in this Chapter is to be used only with respect to Privacy Complaints concerning Protected Health Information [PHI] that is under the control of DMH-operated Facilities/Offices/Programs. DMH vendors who are Covered Entities for the purposes of HIPAA must have their own Privacy Complaint procedures. However, all DMH vendors Privacy Complaints that are also 104 CMR 32.00 Complaints must be processed pursuant to 104 CMR 32.00 in addition to being processed in accordance with the vendor's Privacy Complaint procedures.

In addition to filing a Privacy Complaint with DMH, an individual or PR can file a complaint with the U.S. Secretary of Health and Human Services. DMH must cooperate in any investigation by the Secretary and the Secretary may review such PHI that is maintained by DMH as he/she determines is necessary. The procedures for filing a complaint with the U.S. Secretary of Health and Human Services and a copy of the U.S. Department of Health and Human Services complaint form can be found at <http://www.hhs.gov/ocr/privacyhowtofile.htm>.

II. SPECIFIC REQUIREMENTS

A. Notice of Right to File a Complaint

DMH must inform an individual whose Protected Health Information (PHI) is created and/or maintained by DMH, or his/her PR, if any, of the right to file a Privacy Complaint with DMH and/or the U.S. Secretary of Health and Human Services and how he/she may exercise these rights. This information must be included in DMH's Notice of Privacy Practices and in all DMH written responses to the requests identified in Section II.B.1.

B. Right to File a Complaint

An individual whose PHI is created and/or maintained by DMH, or his/her PR, may file a Privacy Complaint at any time concerning:

1. DMH's response to his/her request:
 - a. to access PHI. In certain circumstances, which are discussed in Chapter 11, Right of Individuals or Personal Representatives to Access Protected Health Information Maintained By DMH, an individual or PR can appeal a denial of access in addition to, or instead of, filing a Privacy Complaint.
 - b. for restrictions on the use and/or disclosure of PHI (Chapter 15).
 - c. for confidential communications (Chapter 14).
 - d. to amend PHI (Chapter 13).
 - e. to receive an audit trail of the disclosures of PHI made by DMH (Chapter 12).
2. DMH's PHI privacy policies and procedures.
3. DMH's compliance with its PHI privacy policies and procedures, including, but not limited to, concerns about the maintenance and unauthorized uses and disclosures of PHI.

C. Complaint Process

DMH must have procedures in place for responding to a Privacy Complaint. DMH must follow these procedures when it receives a Privacy Complaint.

D. No Retaliation

No DMH Workforce Member shall intimidate, threaten, coerce, discriminate against or take other retaliatory action against any individual, or PR, for filing a Privacy Complaint with DMH and the U.S. Secretary of Health and Human Services, or take such retaliatory actions against another DMH Workforce Member for assisting an individual or PR in filing a Privacy Complaint. Any DMH Workforce Member who becomes aware of such retaliatory actions must take immediate steps to ensure that they are stopped and corrected.

III. DMH PROCEDURES FOR PROCESSING A PRIVACY COMPLAINT

With the modifications noted below, DMH's procedures for processing 104 CMR 32.00 Complaints will be used for processing Privacy Complaints.

A. Who May File A Privacy Complaint

Any individual whose PHI is created and/or maintained by DMH, or his/her PR, may file a Privacy Complaint. If an individual who has a PR files a Privacy Complaint, a copy of the Privacy Complaint and DMH's findings with regard to it shall be given to the PR, and the individual shall be notified that the PR was given such copies.

B. Complaint Forms

A Privacy Complaint must be made in writing. The 104 CMR 32.00 DMH Complaint Form, a copy of which is included at the end of this Chapter, may be used for this purpose. However, use of the DMH Complaint Form is not required. If another written document is used for filing a Privacy Complaint, DMH Staff, upon receipt of the Complaint, shall attach a DMH Complaint Form to it. Copies of the DMH Complaint Form shall be available at all DMH Area and Site Offices, Facilities and State-operated Programs and it shall be posted on the DMH Intranet and Internet web pages. A copy of the DMH Complaint Form shall be given to any person upon request.

C. Complaint Process

1. Where Filed. A Privacy Complaint may be filed at any DMH Area or Site Office, Facility or State-operated Program or with the DMH Privacy Officer. All Privacy Complaints shall be date-stamped upon receipt and forwarded immediately to the Person in Charge as defined in 104 CMR 32.02. The applicable Person in Charge is the Person in

Charge of the Area or Site office, Facility or State-operated Program that controls the PHI that is the subject of the Privacy Complaint. If the Privacy Complaint involves PHI controlled by Central Office, the Complaint shall be given to the DMH Privacy Officer. If a Privacy Complaint is received at a DMH location that does not control any of the PHI that is the subject of the Complaint, it shall be sent by Fax to the Person(s) In Charge of the DMH locations(s) where the PHI is located. In addition, a copy of every Privacy Complaint shall be sent to the DMH Privacy Officer.

2. **Privacy Complaint Log.** The 104 CMR 32.00 Public Log Form will be modified to include a place to note that the complaint is a Privacy Complaint. The Log also will note if the Privacy Complaint (in full or in part) is a 104 CMR 32.00 Complaint. This information also shall be noted on the DMH Complaint Form. The DMH Privacy Officer shall develop and maintain with the Office of Investigations a database that will allow DMH to track the receipt and disposition of all Privacy Complaints.
3. **Individual Responsible for Reviewing Privacy Complaints.** A Privacy Complaint is to be reviewed by the Person in Charge, or his/her designee, in the same manner as a 104 CMR 32.00 Complaint. The DMH Privacy Officer will review a Privacy Complaint involving PHI controlled by Central Office.
4. **Time Frame for Reviewing Privacy Complaints.** The time frames for processing 104 CMR 32.00 Complaints shall be used for processing all Privacy Complaints.
5. **Fact-Finding.**
 - a. **Fact-Finding/Investigation.** A 104 CMR 32.00 Complaint fact-finding or investigation, if indicated, must occur for each Privacy Complaint. A Privacy Complaint may not be determined to be "out of scope" until after a fact-finding or investigation occurs. It is believed that most Privacy Complaints will require fact-finding rather than an investigation.
 - b. **Consultation with the DMH Privacy Officer.** At the completion of the fact-finding or investigation, the Person in Charge shall consult with the DMH Privacy Officer as to whether a privacy violation occurred and if so, the appropriate sanctions and/or corrective actions that should be taken.
 - c. **Decision/Decision Letter.** The Person in Charge shall send a decision letter to the complainant. The decision letter will serve as

both DMH's response to the Privacy Complaint and, where applicable, a 104 CMR 32.00 Complaint. A copy of the decision letter concerning a Privacy Complaint must be sent to the DMH Privacy Officer. The decision letter must:

- i. Indicate whether or not the Complaint has been found meritorious and if so, what corrective action will be taken.
- ii. Indicate that the complainant may file a further complaint with the U.S. Secretary of Health and Human Services.
- iii. Indicate whether the Privacy Complaint also qualifies as a 104 CMR 32.00 Complaint (i.e., whether the complaint is "out of scope" or "in scope" for 104 CMR 32.00 purposes). This will depend in part on whether the incident or condition complained of is "dangerous, illegal or inhumane" (104 CMR 32.03).
 - If the Privacy Complaint is determined to be "out of scope" as a 104 CMR 32.00 Complaint, the decision letter must advise the complainant of his/her appeal rights under 104 CMR 32.00 concerning that determination.
 - If the Privacy Complaint is determined to be "in scope" as a 104 CMR 32.00 Complaint, the decision letter must advise the complainant of this determination, the resolution of the 104 CMR 32.00 Complaint and his/her 104 CMR 32.00 appeal rights concerning this resolution. (An allegation that a DMH Workforce Member disclosed PHI maintained by DMH in a manner that violated HIPAA and/or DMH regulations is an example of a Privacy Complaint, which also would be a 104 CMR 32.00 Complaint.)
- iv. Respond to any additional complaint issues that are unrelated to privacy that are alleged on the DMH Complaint Form.

Two sample Privacy Complaint decisions letters are included at the end of this Chapter.

- d. Duty to Cooperate.** All DMH Workforce Members are responsible for cooperating in the review of a Privacy Complaint and for responding to a request for information in a complete and timely manner.

D. Documentation

The documentation procedures for 104 CMR 32.00 Complaints shall be used to document the processing and disposition of Privacy Complaints.

Similarly, Privacy Complaint files shall be maintained in the same manner as 104 CMR 32.00 Complaint files. At a minimum, all Privacy Complaints and responses shall be maintained for six (6) years from the date of the final disposition of the Complaint.

E. Periodic Review of Complaints Filed

The DMH Privacy Officer, and such other persons as the Commissioner of DMH may appoint, shall review the Public Complaint Log periodically to determine if any systemic problem(s) may exist with regard to privacy and if so, to develop plans to address such problem(s).

F. DMH Workforce Training/Assistance

All DMH Workforce Members who provide direct care to individuals shall be trained on how to receive a Privacy Complaint. Such Workforce Members shall provide assistance to individuals and to PRs who need help in filing a Privacy Complaint.

IV. LEGAL REFERENCES AND ATTACHMENTS

HIPAA 45 CFR 160.306

45 CFR 164.520(b)

45 CFR 164.530(d)

DMH Complaint Form

Sample Privacy Complaint Decision Letter 1

Sample Privacy Complaint Decision Letter 2